

PROPERTY, THE INDIVIDUAL, AND GOVERNMENTAL POWER: THE MEANING OF *Gelpcke v. City of Dubuque*

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I. INTRODUCTION

What is commonly perceived as the historical dimension of precedent is the fact that the context in which later courts cite an opinion raises issues other than those dealt with in the original decision. This article attempts to demonstrate that another aspect of the historical dimension of precedent is that knowledge of the precise facts and context in which the original decision was rendered may hold unsuspected significance for problems confronting a later society.

Knowledge of precise facts becomes particularly important because judicial precedent often acts as a limit on the rights of the majority. A proper understanding of the factual underpinnings of a case may, therefore, provide unsuspected precedent for limits on majority power; or conversely, for limits on the involvement of the courts in protecting a complaining minority. Further, the historical significance of cases, accurately understood, may provide consistency for what might otherwise appear to be unprincipled judicial decision making.

A recently prominent school of legal historians perceives nineteenth century American common law as a process utilized in the service of industrial and commercial growth:

[B]y 1820 the process of common law decision making had taken on many of the qualities of legislation. As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies.¹

This thesis has been vigorously challenged with regard to the pre-Civil War period by a study (focused on diversity jurisdiction cases in the federal courts) that claims to demonstrate that the pre-Civil War legal order is best understood as "a decisional process or function that was designed to vindicate the legitimate and discernable expectations of the parties to any given

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1. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 2 (1977).

dispute.”²

The municipal bond cases, of which *Gelpcke v. City of Dubuque*,³ decided in 1863, is the most generally well known, provide one of the bases for restricting to the pre-Civil War period the claim that courts utilized common law doctrines solely to enforce the reasonable expectations of the parties.

The municipal bond cases . . . squarely represent the kinds of cases in which the burden was placed upon noncitizens to determine whether there were requirements of local law that affected a transaction and, if so, whether they had been complied with. The bonds were, to the knowledge of everyone, exclusively creatures of local law. . . . Consequently, what the Supreme Court actually did in [the municipal bond cases] was to create a federal exemption in favor of noncitizens. . . .⁴

The exemption referred to is restricted to noncitizens since, in the absence of a constitutional issue (and the municipal bond cases were not perceived as raising issues of federal constitutional dimensions), a dispute among citizens prior to the introduction of the federal question jurisdiction was restricted to the state courts.

Whenever the “federal exemption in favor of noncitizens” consisted of upholding the validity of bonds in a case where the state courts would have refused to enforce payment, and the *Gelpcke* decision represents one such instance, the result could be characterized as one in which “the legitimate and discernable expectations of the parties” were subordinated to the need to continue attracting the capital investments required for “industrial and commercial growth.” As is possible in all diversity jurisdiction cases, however, such a decision raised the incongruous possibility of state and federal courts resolving the same dispute in opposite ways. It was this possibility, an inevitable concomitant of our federal judicial system, that required the dissent in a recent United States Supreme Court decision to note that:

Under [our] approach, the federal courts do not have jurisdiction to review every foreclosure proceeding in which the debtor claims that there has been a procedural defect constituting a denial of due process of law. Rather, the Federal District Court’s jurisdiction . . . is limited to challenges to the constitutionality of the state procedure itself—challenges of the kind considered in *North Georgia Finishing*, *Fuentes*, and *Shevin*.⁵

The dissent’s repeated insistence that the majority’s result is inconsistent with prior decisions⁶ reflects its concern about the lack of an historical basis which either justifies or clarifies the majority’s decision: a concern bottomed on the fact that the demands we make on the law’s definition of legal relationships includes not only uniformity among courts, but also the formu-

2. R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 4 (1977).

3. 68 U.S. (1 Wall.) 175 (1863).

4. R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 119 (1977).

5. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 177 (1978).

6. See, e.g., note 7 *infra* and accompanying text.

lation of definitions that remain stable over time, which are uniformly applied to all persons perceived as similarly situated.

The significance of precedent in the legal system demonstrates the profession's awareness of the importance of the past, and the dramatic performances that often occur at criminal trials in connection with disputes concerning the intent of the accused demonstrate that lawyers are fully aware of the difficulties involved in the task of historical reconstruction. Specifically, what both lawyers and historians realize is that the meaning of any given event is dependent on the context in terms of which it is perceived, but that an excessive regard for the context is as likely as ignorance of its importance to lead to a distortion of the meaning of the event.

Since decisions are the events dealt with by legal historians, what this article hopes to demonstrate is that neither of the schools of legal history described in this Introduction can adequately account for the decision in *Gelpcke*. To avoid scrutiny of the legal history underlying past decision invites senseless results; to criticize vacillating courts, or courts that have failed to follow prior decisions without a proper perspective of the historical dimension, welcomes ignorance. In this sense, what we mean when we say that every age writes its own history is that the questions with which each age struggles define the context in terms of which prior events are properly perceived. The method used to demonstrate this is a presentation of the history of the recent Supreme Court case, *Flagg Brothers, Inc. v. Brooks*, and then *Gelpcke*, in order to clarify the questions posed by the recent decision.

II. *FLAGG BROTHERS, INC. v. BROOKS*—THE HISTORICAL QUESTIONS

On June 13, 1973, Shirley Brooks and her family were evicted from their apartment, and the city marshal arranged for their possessions to be stored by Flagg Brothers, Inc., in its warehouse. After a series of disputes over the amounts being claimed for moving and storing the possessions, Flagg Brothers, Inc., on August 25, 1973, sent Brooks a letter threatening to sell the possessions if the payments were not made within 10 days, a method of enforcing a warehouseman's lien on goods entrusted to him for storage permitted by New York Uniform Commercial Code section 7-210.⁷

7. U.C.C. § 7-210:

ENFORCEMENT OF WAREHOUSEMAN'S LIEN

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

When a series of subsequent letters failed to resolve the dispute as to the validity of the charges being claimed by Flagg Brothers, Inc., a class action was instituted in federal district court seeking a declaration that the sale permitted by section 7-210 would violate the Due Process and Equal Protection clauses of the Fourteenth Amendment. All parties agreed to dismiss the city marshal from the case. On July 7, 1975, finding that the warehouseman's conduct was not that of the state, the district court dismissed the suit for want of jurisdiction.⁸ The Court of Appeals for the Second Circuit, although recognizing that the Court of Appeals for the Ninth Circuit had reached a contrary conclusion in interpreting an identical California statute,⁹ found sufficient state involvement to invoke the provisions of the Fourteenth Amendment, and consequently reversed the judgment of the district court.¹⁰

On May 15, 1978, holding that the "total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as *North Georgia Finish-*

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.
(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, and advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

8. *Brooks v. Flagg Bros., Inc.*, 404 F. Supp. 1059 (S.D.N.Y. 1975).

9. *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976).

10. *Brooks v. Flagg Bros., Inc.*, 553 F.2d 764 (2d Cir. 1977).

ing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969)";¹¹ the Supreme Court reversed the Second Circuit Court of Appeals. Mr. Justice Brennan took no part in the case.¹² Mr. Justice Stevens, joined by Mr. Justice White and Mr. Justice Marshall, dissented on the basis that "the Court's holding is fundamentally inconsistent with, if not foreclosed by, [those] prior decisions. . . ." ¹³ "In each of these cases a finding of state action was a prerequisite to the Court's decision. The Court today seeks to explain these findings on the ground that in each case there was some element of 'overt official involvement.' " ¹⁴ "If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the State supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional *scrutiny* by removing even the mechanical supervision." ¹⁵

Finally, it is obviously true that the overwhelming majority of disputes in our society are resolved in the private sphere. But it is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions. The Court today holds that our examination of state delegations of power should be limited to those rare instances where the State has ceded one of its "exclusive" powers. As indicated, I believe that this limitation is neither logical nor practical. More troubling, this description of what is state action does not even attempt to reflect the concerns of the Due Process Clause, for the state-action doctrine is, after all, merely one aspect of this broad constitutional protection.

In the broadest sense, we expect government "to provide a reasonable and fair framework of rules which facilitate commercial transactions . . ." *Mitchell v. W.T. Grant Co.*, 416 U.S., at 624 (POWELL, J., concurring). This "framework of rules" is premised on the assumption that the State will control nonconsensual deprivations of private property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause. The power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.¹⁶

Whether, given that it forgot the history of prior cases, the majority is correct is open to debate. An understanding of the historical environment of

11. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978).

12. *Id.* at 166.

13. *Id.* at 169.

14. *Id.* at 173.

15. *Id.* at 175.

16. *Id.* at 178 (footnotes omitted).

cases, however, is usually a necessary prerequisite to sound judicial decision making. The following sections attempt to illustrate the interrelationships between history and the judicial decision making process.

III. THE CASE OF *GELPCKE V. CITY OF DUBUQUE*

(i)

Herman Gelpcke was a New York investor, who in 1860 was president of the Dubuque and Pacific Railroad and held a mortgage under which he acted as trustee for that railroad.¹⁷ He also held a mortgage on, and was an important stockholder in, the Dubuque and Western Railroad.¹⁸

Section 27 of the legislative act incorporating the city of Dubuque, which was adopted on February 24, 1847, provided that "whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque. . . ." ¹⁹ A bond issue to aid the Dubuque Western Railroad in an amount up to \$250,000 was approved by the required majority of the Dubuque electorate in December, 1856. The bonds were issued as of July 1, 1857, and bore coupons for interest payable every half year in the city of New York. The bonds recited that they were given "for and in consideration" of stock of the Dubuque Western Railroad Company, and that for due payment "the said city is hereby pledged, in accordance with the Code of Iowa, and an act of the General Assembly of the State of Iowa, of January 28, 1857."

When the coupons were not paid, Gelpcke sued the city of Dubuque in the Iowa District Court. The bonds were held unenforceable under applicable state law, and judgment was entered for the city of Dubuque.²⁰ In the Supreme Court of the United States it was

insisted that in cases involving the construction of a State law or constitution, this court is bound to follow the latest adjudication of the highest court of the State. *Leffingwell v. Warren*, 2 Black, 599, is relied upon as authority for the proposition. In that case this court said it would follow "the latest *settled* adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine.²¹

Leffingwell was not regarded as governing the decision in *Gelpcke v. City of Dubuque* because "[i]t cannot be expected that this court will follow every . . . oscillation [of the highest court of the state], from whatever cause arising, that may possibly occur. . . . To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."²²

17. REPORT OF THE DUBUQUE AND PACIFIC RAILROAD COMPANY 2 (1860).

18. THE RECEIPTS AND EXPENDITURES OF THE DUBUQUE WESTERN RAILROAD 18 (1858).

19. An Act to Incorporate the City of Dubuque, ch. 82, § 27, 1846-1847 Iowa Acts 114.

20. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 178 (1863).

21. *Id.* at 205.

22. *Id.* at 205-06.

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving construction of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.²³

Mr. Justice Miller dissented.²⁴ Conceding that the "moral force" of the majority's position was "unquestionably very great,"²⁵ he predicted "that none of my brethren who concur in the opinion just delivered, would go so far as to say that the inferior State courts would have a right to disregard the decision of their own appellate court, and give judgment that the bonds were valid. Such a course would be as useless, as it would be destructive of all judicial subordination."²⁶ But, he noted, "this is in substance what the majority of the court have decided [for suits brought in federal courts sitting in Iowa]."²⁷ Justice Miller pointed out that:

The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.²⁸

Mr. Justice Miller's "understanding [of] the doctrine . . . in such cases" rests on his refusal to accept the proposition he finds basic to the majority's rationale—"The decision of the court makes the law." It should be noted, however, that this judicial disagreement concerning the nature and source of law seems not to be regarded as relevant by legal historians in their analysis of *Gelpcke*. As put by Charles Fairman, author of the Holmes Devise History of the Supreme Court for the post-Civil War period:

Whether the Iowa court had done well or ill in overruling a precedent is not the issue in a critique of *Gelpcke v. Dubuque*. The question is, on what rational basis can one justify the Supreme Court's refusal to follow the State Court's decision on a matter of

23. *Id.* at 206-07.

24. *Id.* at 207.

25. *Id.* at 210.

26. *Id.* at 208.

27. *Id.*

28. *Id.* at 211.

State law?²⁹

(ii)

Iowa v. Wapello County,³⁰ the decision of the Supreme Court of Iowa that *Gelpcke* refused to follow, made explicit why it was felt necessary in some circumstances to take an action that could be perceived as overruling a precedent. In connection with the “expectations of the parties” and the impact of its ruling on “commercial and industrial growth,” the state court noted that:

[W]e are not insensible that . . . at this late date, we are liable to expose ourselves and our people to the charge of insincerity and bad faith, and perhaps that which is still worse, inflict a great wrong upon innocent creditors and bondholders—consequences which we would most gladly have avoided, if we could have done so, and been true to the obligations of conscience and principle.³¹

That the obligation felt to be compelling involved something other than what were understood to be the rules of law was also made clear:

We know, however, that there is such a thing as a moral sense and a public faith which may be successfully appealed to, when the law is impotent to afford relief. These sentiments, we cannot but believe, still reside in the hearts and consciences of our people, and may be invoked to save themselves and their state from seeming bad faith.³²

The printed report of the *Gelpcke* decision in the United States Supreme Court begins by setting out provisions of the “Constitution of the State of Iowa, adopted in 1846. . . .”³³ Among these provisions, article 7 provided that “[t]he General Assembly shall not in any manner create any debt or debts . . . which . . . shall . . . exceed the sum of one hundred thousand dollars,”³⁴ and article 8, section 2, that “[t]he State shall not directly or indirectly become a stockholder in any corporation.”³⁵ These provisions were typical in state constitutions adopted in the middle of the 19th century, reflecting the disastrous experiences during the first half of the century in connection with debts incurred as the consequence of public funding of “internal improvements” such as roads and canals. How to fund such improvements represented one of the most significant political issues of the day, and in the constitutional convention which drafted the document quoted in *Gelpcke*, a Whig minority unsuccessfully argued for more moderate restrictions.³⁶

29. 6 C. FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1888*, pt. 1, at 937 (1971).

30. *Iowa v. County of Wapello*, 13 Iowa 388 (1862).

31. *Id.* at 423.

32. *Id.* at 424.

33. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 176 (1863).

34. *Id.*

35. *Id.*

36. B. SHAMBAUGH, *FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS*

The difficulty faced by Iowa Democrats in connection with supporting internal improvement programs was the national party position, firmly maintained since the Presidency of Andrew Jackson, that funding for such programs should come from state and local rather than federal sources. As a result, the new Republican party, like the Whigs, could portray themselves, within Iowa, as more aware than their Democratic opponents of the need to raise capital for continued "industrial and commercial growth." In 1856, for example, when a six-year campaign waged by Iowa Democrats in Congress succeeded in obtaining passage of a bill granting over three million acres of land for railroad construction, the Republicans, in control of the governorship and state legislature, rather than accepting the bill as a recognition by the national Democratic party of Iowa's need for internal improvements, accepted the grant only after two weeks of a special session devoted to proclaiming Republican dedication to the cause of railroad construction.

At this time, the Supreme Court of Iowa was regarded as having approved the constitutionality of county bonds in its 1853 ruling in *Dubuque County v. Dubuque & Pacific Railroad Co.*,³⁷ the first case in which the validity of bonds issued in connection with railroad construction had been challenged. The county judge had proclaimed an election at which the bonds were approved, but the county delayed the process of their issuance by bringing an action in a state district court challenging the regularity and legality of the election proceedings, the constitutionality of the vote in light of the constitutional provisions restricting state power to hold stock and incur debt,³⁸ and the statutory authorization for the election, which had been proclaimed under a provision that referred only to roads, bridges and public buildings.³⁹

The judgment of the Iowa District Court, holding the bond issue valid, was affirmed in the Iowa Supreme Court by two of the three judge panel. The majority opinion rejected the constitutional challenge on the basis that:

OF 1844 AND 1846, at 341, 347-55 (1900). For a summary of the Whig position on this issue, see also a public address in the *Iowa Standard*, July 20, 1846, at 1, col. 2:

The inventive spirit of the age, is at work to annihilate time and space, and bring the markets of the East and the South to the doors of the Western Agriculturist. If we would maintain our proper position in the Union, we must march in the footsteps of our Western sisters, and engage in these undertakings. To refuse, is to exclude our products from the great markets of the world. . . . The article on State Debts is tantamount to an inhibition of the construction of such works by the State government. . . . It not only deprives us of the use of foreign capital, which might easily be obtained at a reasonable interest, but it throws the whole burden of the construction of such works upon the citizens of the State. It deprives the people collectively of a right they possess individually—the right to throw their credit and character into market, and make them serve the purposes of capital. The State government is but an aggregate individual, is subject to the same laws of finance, which govern single persons, and should possess the same liberty to make contracts that individual citizens enjoy.

37. 4 Greene 1 (Iowa 1853).

38. See notes 34-35 *supra* and accompanying text.

39. The county judge may submit to the people of his county at any regular election or at a special one called for that purpose, the question whether money may be borrowed to aid in the erection of public buildings; whether the county will construct, or aid to construct, any road or bridge which may call for an extraordinary expenditure.

IOWA CODE § 114 (1851).

There is quite as much identity and affinity between a citizen and the state, as there is between a county and the state. But no one will contend that a constitutional restriction upon the state government is also a restriction upon a citizen of the state; how then can it be claimed that such a state restriction should be enforced against a county?⁴⁰

The statutory challenge was disposed of on the basis that "We can see no good reason [to restrict the meaning of the words 'any road' to common roads, streets and lanes]."⁴¹

As to the statutory interpretation of the words "any road" to include the portion of a railroad line within the county, Judge Kinney in dissent noted that a clause referring to "any work of internal improvement" had been stricken from the provision at issue by the legislature,⁴² that the succeeding legislature twice rejected a law enabling counties to assist the building of railroads,⁴³ and that another provision in the Code defined the word "road" to "include public bridges, and . . . [as] . . . equivalent to the . . . county road, common road, and state road."⁴⁴ As Mr. Justice Miller noted in his dissent:

The opinions of the court were by law filed with the clerk, and by him copied into a book kept for that purpose. The dissenting opinion of Judge Kinney, a very able one, is there found in its proper place, in which he says, he has never seen the opinion of the majority. No such opinion is to be found in the clerk's office, as I have verified by a personal examination. Nor was it ever seen, until it was published five years afterwards . . . by one of the judges, who had ceased to be either judge or official reporter at the time it was published.⁴⁵

The judge referred to, who published the opinions in 1858, was the author of the majority opinion.

The persistence of legal doubts in Iowa about the validity of railroad bonds is evidenced by the fact that, during 1856 and 1857, the legislature

40. *Dubuque County v. Dubuque & Pacific R.R. Co.*, 4 Greene 1, 3 (Iowa 1853).

41. *Id.* at 4.

42. *Id.* at 13.

43. *Id.* at 15.

44. *Id.* See also *id.* at 16:

I have not been insensible of the weighty consequences suspended upon the decision of this case. I have endeavored in vain to prevent a decision which I believe erroneous, and which must sooner or later be so declared. Counties have voted stock for railroad purposes from fifty to four hundred thousand dollars each, with indifference as to payment, which to my mind is most alarming. But few of the counties in comparison to the entire number intrusted have as yet voted, and it is but a fair deduction unless this spirit is soon checked, that the state will not be less than ten million of dollars in debt within the next five years for railroad purposes alone. The interest upon this enormous sum will not be less than seven hundred thousand dollars per annum, all of which must be raised by direct tax upon the people. In these times of feverish excitement, when the public mind is jostled off from its true balance, when public and private economy as well as natural justice are lost sight of in the clamor for public improvements, would it not be well to pause, or refer back to first principles, and reflect upon consequences which involve a sacrifice of constitutional rights, loss of private property, and an utter perversion of county and city organization.

45. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 217 (1863).

passed a series of enactments either legalizing previously held elections or authorizing the holding of a specific election dealing with bond issuance,⁴⁶ including one dealing with the bonds at issue in *Gelpcke*, which was cited at the beginning of the report of the case.⁴⁷ More specifically, in terms of judicial rulings by the Iowa Supreme Court on the question of the constitutionality of county bonds, *Iowa v. Wapello County*⁴⁸ noted that:

Dubuque County v. The Dubuque & Pacific Railroad Company . . . , where it was held by a majority of the court that the power had been conferred by § 114 of the Code of 1851, was followed in its enunciation by a very clear and able dissenting opinion from Judge Kinney.

The last decision by our predecessors was in the case of *Stokes et al. v. The County of Scott*, . . . where it was held that this power had not been conferred.

The intermediate decisions were an acquiescence in the former of these, by two members of the court, not upon the ground that the Legislature had in fact authorized the exercise of any such power by the cities or counties in this State (for about this they had expressed very great doubts, and affected not to believe it), but because they felt themselves so much committed and trammelled by the previous decision and subsequent legislative recognition, that they did not feel themselves at liberty, from public considerations, to unsettle the construction which the first decision had given to the Code on the subject.

In this aspect of the case it will be perceived that the question now under consideration is an entirely open one in this State, and that this court as now constituted must pass upon it as an original question, wholly unaffected by the doctrine of *stare decisis*; or, if influenced at all by prior decisions, we should be inclined to follow the later rather than the earlier opinions.⁴⁹

In the *Stokes* case, decided in 1859, Chief Judge Wright repeated the statutory interpretation arguments⁵⁰ advanced in dissent by Judge Kinney,⁵¹ and also held the bond issue beyond the constitutional power of the county.

46. An Act to Legalize the Issuing of Corporation Bonds of Ft. Madison, ch. 25, 1856 Iowa Acts 73 (extra session); An Act to Authorize Certain Towns Therein Named to Subscribe to the Capital Stock of Railroad Corporations, and to Issue Bonds to Aid in the Construction of Railroads, ch. 29, 1856 Iowa Acts 75 (extra session); An Act to Authorize the City of Dubuque, St. Peters and St. Paul Railroad Company, ch. 178, 1856-1867 Iowa Acts 270; An Act to Authorize the City of Dubuque to Issue Bonds to Aid in the Construction of Certain Railroads Named Therein, ch. 205, 1856-1857 Iowa Acts 339; An Act to Authorize the City of Keokuk to Levy a Direct Tax, Not Exceeding \$150,000, for the Benefit of the Keokuk and Fort Des Moines Railroad Company, ch. 239, 1856-1857 Iowa Acts 399.

47. An Act Authorizing City of Dubuque to Issue Bonds to aid in the Construction of Certain Railroads Named Therein, ch. 205, 1856-1857 Iowa Acts 339.

48. *Iowa v. County of Wapello*, 13 Iowa 388 (1862).

49. *Id.* at 395.

50. *Stokes v. County of Scott*, 10 Iowa 166, 173-77 (1859).

51. See notes 42-44 *supra* and accompanying text. As the *Wapello* court noted:

The great marvel is, that this fragment of legislative history, should have escaped the notice of our predecessors who first gave a construction of this section of the Code. Of course, we are not at liberty to suppose for an instant, that with a knowledge of these facts, they could have

Judge Woodward, however, held the issue valid, and while Judge Stockton concurring in the Chief Judge's interpretation of the statutory provision, stated that, "As to the power in the legislature, there has been at no time any doubt in my mind. I think the power may by them be conferred upon the counties to take the stock and issue the bonds without any constitutional objection. . . ." ⁵²

1857, the year in which the Iowa legislature retroactively attempted to confer such a power on Dubuque in connection with the bonds at issue in *Gelpcke*, saw a panic which lowered railroad construction to 90 miles of track from 186 the previous year. In 1858, the depression was sufficiently severe that only 35 miles were laid, and, because of delays in the federal certification process, no help was obtained from the lands granted for railroad construction in 1856, certification of which depended on the miles of track laid each year. ⁵³

The panic, together with lack of success in attempting to obtain a bond issue in England, drove the Dubuque and Pacific Railroad Company to the edge of bankruptcy. ⁵⁴ As a result, in 1858, Platt Smith, a vice-president of the railroad and an attorney in Dubuque, proposed, at a public meeting in Buchanan County, a plan whereby the county would institute a property tax in effect payable in farm products, the proceeds from the sale of which would be used to buy stock in the railroad company. The proposal failed of approval at a special county election. ⁵⁵ Earlier in the year, when a bond issue for the railroad was proposed in Hamilton County, a local newspaper adverted to the 1856 land grants:

It is . . . a query in the minds of many, as to what the Company want these bonds for. They have a most munificent land grant—sufficient to build the road and leave a large surplus—and have had nearly \$2,000,000 worth of private property donated to them along the line of the Road. . . . In these hard times, every dollar of taxation, present or prospective, makes the people groan. ⁵⁶

(iii)

Mr. Justice Miller described *Iowa v. Wapello County* in the following terms: "The opinion in that case, delivered by Judge Lowe, covers the whole ground . . . [and] is exhausting, able, and conclusive." ⁵⁷

In that decision, after "admit[ting] that if the question before us involved no other principle than that of a right construction of a statutory

adopted a construction so utterly at variance with the known and declared intention of the Legislature. . . .

Iowa v. County of Wapello, 13 Iowa 388, 398 (1862). See note 45 *supra* and accompanying text.

52. *Stokes v. County of Scott*, 10 Iowa 166, 179 (1859).

53. J. PARISH, *GEORGE WALLACE JONES* 206-09 (1912).

54. *REPORT OF THE DUBUQUE AND PACIFIC RAILROAD COMPANY* 12-18 (1858).

55. *HISTORY OF BUCHANAN COUNTY, IOWA* 93-96 (Williams Bros. pub. 1881).

56. *Hamilton Freeman*, Jan. 28, 1858, at 2, col. 3.

57. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 218-19 (1863).

enactment, [the writer of this opinion] could not be persuaded to disturb adjudications under which large interests have been acquired,"⁵⁸ Judge Lowe defined the question to be resolved as "whether the Legislature can, under any circumstances, pass a valid law which will make it lawful for a county or city in its corporate capacity to subscribe stock in a railroad company."⁵⁹ Given the definition of cities and counties as "intermediate agencies or instruments of government, standing between the people and the sovereignty of the State, for the purpose of devising and executing certain local police regulations,"⁶⁰ "[i]t will . . . be conceded, [he argued] that counties exercising the taxing power must be restricted to purposes alone municipal and local."⁶¹ The railroads, on the other hand, were both private and of interest to more than the local community. As a result, because "I have shown by the laws of this state, that, under certain circumstances, the individual property of the citizen of Wapello county, can be taken to pay the debts of this [railway] company, growing out of their responsibilities as carriers,"⁶² Judge Lowe concluded that, as to "the two hundred citizens of Wapello, who voted against the railroad subscription,"⁶³ but are subject to the liability,

that it was in consequence of an act of the Legislature, conferring the power on the county of Wapello to subscribe, in her municipal capacity, stock in a railroad company. Nothing can be clearer to the mind of the writer of this opinion than that the exercise of this power and freedom in the choice of pursuits cannot stand together. If such a law can be upheld as a rightful exercise of legislative power, then the reserved rights of the citizen, as well as the guaranties of the Constitution, are all a myth.⁶⁴

Those words were written in 1862. Three years earlier, with state elections approaching, Ralph P. Lowe, who was then serving as governor, would have been pleased to act in conformity with Iowa's two-term tradition by accepting renomination from his Republican party. The party convention, however, nominated Samuel J. Kirkwood for governor by acclamation, and, because Lowe had agreed to stand aside, nominated him for election to the Supreme Court of Iowa.⁶⁵

In April of the preceding year, Platt Smith, as part of his efforts to combat the effects of the depression on railroad construction, wrote to several prominent personages gathering views concerning state aid for railroads. In a letter to Senator James W. Grimes, a Republican and Lowe's predecessor as governor, he expressed the view that state aid would be popularly sup-

58. *Iowa v. County of Wapello*, 13 Iowa 388, 399 (1862).

59. *Id.* at 399-400.

60. *Id.* at 403. See note 40 *supra* and accompanying text.

61. *Id.* at 404.

62. *Id.* at 409.

63. *Id.*

64. *Id.* at 409-10.

65. D. CLARK, SAMUEL JORDAN KIRKWOOD 126 (1917).

ported in counties along the line of the Dubuque and Pacific.⁶⁶ Two months later, he wrote Governor Lowe, requesting that a special session of the legislature be convened to submit a proposal concerning state aid to the voters in October.⁶⁷

In a letter dated June 22, Lowe objected to the haste required to comply with legal requirements, and proposed an alternative scheme in which the state would issue bonds, and use the proceeds to purchase materials used in railroad construction, which materials would be sold to the railroads (after the railroads had prepared the roadbeds on which the materials were to be used) for bonds issued by the railroads and bearing at least one percent more interest than the state bonds. Should all railroads agree on such a scheme, and public opinion approve, a special session could be called.⁶⁸

In his response, Smith suggested a convention at which supporters of railroad construction could agree on a course of action,⁶⁹ and Lowe agreed that a convention should be held "at some central point . . . soon after the election."⁷⁰ In November, United States Senator James Harlan, whose second term in the Senate would be decided upon by the state legislature elected in 1859, wrote to Lowe expressing doubts about the prospect of state aid to railroad construction:

Independent of the cry of extravagance, which Demagogues would be certain to raise, would it not give our opponents the *voters* along the lines of these roads, sufficient to swamp our small majority in the State at large, and, also, enable them to so distribute them as to carry the Senate and the House? And if so, would all the good growing out of the *more rapid* completion of these public works, compensate for the loss of the control of the State Government, and our position in the ranks of *Republican States* in 1860, when our vote, as a state, may elect a President of the United States? These are considerations that doubtless have been, or will be maturely considered by you before your influence will have been cast for or against the proposition.⁷¹

The convention concerning aid to the railroads, held in Iowa City in December of 1858, voted "in favor of a judicious system of State aid to such Railroads as are of State importance to an amount not exceeding eight millions of dollars" and requested the governor to convene a special legislative

66. Letter from Platt Smith to James Grimes (April 6, 1858) (on file at 8D5.1 of the Illinois Central Archives, Newberry Library, Chicago, Ill.).

67. Letter from Platt Smith to Ralph Lowe (June 7, 1858) (on file at 8D5.1 of the Illinois Central Archives, Newberry Library, Chicago, Ill.).

68. Letter from Ralph Lowe to Platt Smith (June 22, 1858) (on file at 8D5.1 of the Illinois Central Archives, Newberry Library, Chicago, Ill.).

69. Letter from Platt Smith to Ralph Lowe (July 10, 1858) (Governors' correspondence on file at 721 of the Iowa State Dep't of History and Archives, Des Moines, Iowa).

70. Ralston, *Governor Ralph P. Lowe and State Aid to Railroads: Iowa Politics in 1859*, 58 IOWA J. HISTORY 207, 212 (1960).

71. Letter from James Harlan to Ralph Lowe (Nov. 11, 1858) (Governors' correspondence on file at 637 of the Iowa State Dep't of History and Archives, Des Moines, Iowa).

session.⁷² A minority report, written by Kirkwood, objected that any such system would require an amendment to the state constitution,⁷³ a view that was hinted at in 1856, the year of the federal land grants, by Governor James W. Grimes in his first biennial message:

The Constitution wisely provides that the State shall not in any manner create a debt exceeding one hundred thousand dollars. The framers of that instrument did not imagine that there was a great necessity to prohibit the counties from creating large public debts, for the reason that the history of the country did not then present the case of a county becoming a large stockholder in private corporations.

Without stopping to inquire into the authority under which loans have heretofore been voted, it seems to me that prudence and sound policy requires [sic] that some check be imposed upon the future exercise of this power to create public indebtedness.⁷⁴

In May of 1859, prior to the Republican convention, Grimes wrote to Kirkwood that:

Our democrats are all for Lowe, of course. They hope his nomination & then they will publish some of his foolish letters in favor of state aid written by him last autumn. . . . Outside of Lee, Polk & Du Buque counties I do not know any body in favor of his nomination in our party.⁷⁵

Kirkwood was elected governor within a year of signing the minority report dissenting from the position taken by the convention. The following year, 1860, the legislature passed an act prohibiting future bond assistance by subordinate political units,⁷⁶ a declaration whose passage may well have been facilitated by the fact that town bonds in aid of railroad construction had been legislatively approved in only one instance since the 1857 enactments.⁷⁷

Eight years later, however, in 1868, the General Assembly authorized townships, towns, or incorporated cities to assist railroads by turning over to them as a gift the proceeds of taxes approved by popular vote.⁷⁸ The following year, the Supreme Court of Iowa ruled that such an act was unconstitutional because it could not be upheld

without sanctioning the . . . principle . . . [t]hat it is competent for the legislature, because of the incidental advantage which would result to the community from the carrying out of the objects of a volun-

72. Ralston, *supra* note 70, at 215.

73. *Id.* at 216.

74. 2 THE MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA 37 (B. Shambaugh ed. 1903).

75. Letter from James Grimes to Samuel Kirkwood (May 29, 1859), reprinted in *Letters of James W. Grimes*, 22 ANNALS OF IOWA 469, 499-500 (3d ser. 1940).

76. Revision of 1860, ch. 55, art. 8.

77. An Act Legalizing Certain Bonds Issued by the City of Comanche, ch. 68, 1860 Iowa Acts 79.

78. An Act to Enable Townships and Incorporated Towns and Cities to Aid in the Construction of Railroads, ch. 48, 1868 Iowa Acts 54.

*tary private railway corporation, organized for pecuniary profit, to authorize a tax to be levied on the citizen and his property, to be given as a bounty to such private corporation, to be used in aid of its undertaking, without any pecuniary compensation to the tax payer being contemplated or provided.*⁷⁹

It noted, however, that such a holding about legislative competence was technically *dictum*, since "It is absolutely impossible . . . to hold the act of 1868 to be valid, and yet stand by the decision in the *Wapello County Case*. . . ."⁸⁰

The next legislature, meeting in 1870, authorized subordinate political units to vote taxes in aid of railroad construction, in an act which differed from that passed in 1868 primarily because it required railway corporations to show that they had already expended on construction double the amount of the proceeds given them rather than that they had already spent an amount equal to the tax.⁸¹ The Supreme Court of Iowa upheld the 1870 legislative act in an opinion joined by the sole dissenter from the decision invalidating the 1868 statute and dissented from by the only other member of the panel who had been a judge of the Supreme Court of Iowa when the 1868 legislation was invalidated.⁸² As to that earlier legislation, the court noted that "[i]f this case but involved a second time the validity of the act of 1868 . . . we might regard the question as to *that* act settled by [the earlier] case, but as the general assembly has re-asserted its authority and re-enacted the law with important modifications, we have treated the question as still an open one"⁸³ In terms of judicial precedents, it distinguished the earlier decisions on the following basis:

The real decision, in the *Wapello County* case was, that the legislature had never authorized the municipal corporations of this State to subscribe stock to railroads, issue bonds and levy and collect taxes to pay the same, and that those municipal corporations possessed no power independent of express legislative authority to subscribe to the stock of railroad companies, issue bonds therefor, and levy and collect local taxes to pay the same. To that decision, and to the whole series of decisions of this court holding invalid county and city bonds, issued for that purpose, we give our unqualified approval. But it is given on the grounds that the general assembly had never passed any act conferring the power, and that without such legislation it did not exist.⁸⁴

This series of decisions puts in question the position of Mr. Justice Miller that "[the *Wapello County*] case may now be considered as finally settling the law . . . in the courts of Iowa. . . . It is altogether improbable

79. *Hanson v. Vernon*, 27 Iowa 28, 58 (1869).

80. *Id.* at 38.

81. An Act to Enable Townships, Incorporated Towns, and Cities to Aid in the Construction of Railroads, ch. 102, 1870 Iowa Acts 105.

82. *Stewart v. Board of Supervisors of Polk County*, 30 Iowa 9 (1970).

83. *Id.* at 11-12.

84. *Id.* at 29.

that any serious effort will ever be made to shake its force in that State. . . ."⁸⁵ Specifically as to the nature and source of law in *Wapello County* in other words, it could be argued that the history of Lowe's gubernatorial years demonstrates that, in reality, it is the background of the judge rather than the "decision of the court" that "makes the law."⁸⁶

IV. THE PRECEDENT OF *GELPCKE V. CITY OF DUBUQUE*

(i)

Throughout the 1850's, both Whigs and Democrats in the General Assembly supported legislation aimed at revising the Constitution of 1846. Twice the legislature, controlled by Democrats, enacted bills calling for a public referendum on the question, and twice the Democratic governor vetoed them. The second veto message, in 1853, although based on technical grounds, expressed "a deep concern at the opinion entertained by some portion of the people, in favor of . . . the establishment of banks, of special acts of incorporation for pecuniary profit, and of contracting debts without limitation by the General Assembly."⁸⁷ What the Governor was referring to was article 8, section 2 of the Constitution of 1846, which provided:

Corporations shall not be created in this State by special laws, except for political or municipal purposes; but the General Assembly shall provide, by general laws, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not directly or indirectly become a stockholder in any corporation.

After Republican James W. Grimes won election as governor in 1854, the legislature passed a referendum measure, and the constitutional convention approved by the voters met in Iowa City on January 19, 1857. Following in the tradition of their Whig predecessors, the Republicans succeeded in obtaining approval for the establishment of banking, as well as a clause increasing the state debt limit from \$100,000 to \$250,000.⁸⁸

With the exception of banking, the issue which occupied the most time during the proceedings of the Convention was whether the freedom of cities and counties to incur bonded indebtedness should be limited.⁸⁹ Because certain political units had already incurred considerable debt, the argument that it would be unfair to deny such an opportunity to other cities and counties, together with a disagreement as to whether the situation should be treated in the Constitution or left to legislative action, resulted in a provision

85. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 219 (1863).

86. See note 29 *supra* and accompanying text.

87. 1 THE MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA 476-78 (B. Shambaugh ed. 1903).

88. See note 36 *supra* and accompanying text.

89. Herriott, *Iowa's Treasury Deficit in Light of the Constitutional Debates*, 3 ANNALS OF IOWA 631, 638 (3d ser. 1899).

limiting the indebtedness of cities and counties to five percent of their taxable property.⁹⁰

Ralph Lowe was the first governor elected under the Constitution of 1858; and it is my contention that this constitutes the most significant historical fact in light of which the *Wapello County* decision must be assessed. Thus, the reason the *Wapello County* opinion felt free to argue "that this court as now constituted must pass upon [the constitutionality of city and county bonded indebtedness] as an original question, wholly unaffected by the doctrine of *stare decisis*"⁹¹ appears to be, not only that constitutional action had been taken on county debts, but also that the one significant change made by the convention in connection with the judiciary consisted of providing for the popular election of judges. Even members of the convention who regarded their constituents as satisfied with the activities of the judicial branch agreed that the public demanded that future supreme courts be different, in that they consist of judges elected by the people rather than the legislature.⁹²

(ii)

Analyzing *Gelpcke* in terms of federalism, as the legal historians have done,⁹³ seems justified by the fact that the dispute presented to the courts developed as a result of the disparity between the attitudes towards internal improvements held by Iowa Democrats and the national party.⁹⁴ If one is concerned with *Gelpcke*'s significance as a precedent, however, it seems inappropriate to focus on process rather than substance, on whether state or federal law should apply rather than on the question of the content of the applicable law.

The law at issue in *Gelpcke* was a public act making all members of a political unit liable for the debts of a private enterprise after the majority of the voting members of that unit in effect determined that the private enterprise was fulfilling a public function. The question presented, in terms of legal history, is the contemporary meaning of *Gelpcke*: the significance of the Supreme Court's refusal to follow a state court's determination that such an act was unconstitutional.

The precedential significance of that refusal as a source of law-making authority for the federal courts was significantly undercut by the promulgation of the *Erie v. Tompkins* doctrine in diversity cases. If one views *Gelpcke* in terms of the substantive content of the rule it was applying, however, it presents the issue of the extent to which judicial enforcement of constitutional guarantees could be permitted to override the need to achieve stability

90. See 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 1033 (W. Blair Lord, reporter 1857).

91. Iowa v. County of Wapello, 13 Iowa 388, 395 (1862).

92. See 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 254, 257 (W. Blair Lord, reporter 1857).

93. See note 29 *supra* and accompanying text.

94. See note 36 *supra* and accompanying text.

and uniformity in legal rules affecting rights to property. So viewed, analysis of Mr. Justice Miller's objection to the position taken by the *Gelpcke* majority serves to clarify the issues presented by *Flagg Brothers, Inc. v. Brooks*.

The precise issue raised by *Flagg Brothers* is whether the storage business obtained by a warehouseman in connection with eviction proceedings is sufficient in magnitude to justify imposition of the financial burdens entailed by procedural due process requirements and constitutionally imposed upon public agencies. That the issue delineated above, rather than one involving considerations of federalism, is what separates the *Flagg* majority and the dissent seems clear from the statement in the latter's opinion that, "under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a state court."⁹⁵ What the *Flagg* majority holds, in other words, is that eviction did not make Brooks' situation vis-à-vis the warehouseman sufficiently different from other persons storing goods with *Flagg Brothers, Inc.* to justify the judiciary in treating *Flagg Brothers* differently from warehousemen who do not cooperate with the State in eviction proceedings.

The dissent's objection to that holding is both that it violates "the assumption that the State will control nonconsensual deprivations of property"⁹⁶ and that the rule promulgated by the majority is "foreclosed by . . . prior decisions."⁹⁷ *Wapello County*, however, can be read to hold that, in connection with application of a legal rule affecting rights to property, it is unconstitutional to regard dissenters as bound by the determination that a private enterprise is fulfilling a public function, and the *Gelpcke* dissent can be read to recognize that such a constitutional prohibition takes precedence over the need for stability in judicial decisions that constituted the underpinning for the *Gelpcke* majority's holding. The number of persons in any given political unit who get evicted will, of course, almost always exceed the number of warehousemen located within that unit who deal with the State. In the municipal bond cases, however, it was also almost always the case that those who voted against the issuance of bonds assisting railroad construction constituted a minority within the community.

V. CONCLUSION

Judicial precedents function in this society as limitations on the rights of the majority, and *Gelpcke* dealt with the question of the nature and source of those limitations in the context of individual property rights. The need to protect such rights, which provided the basis for the limitations on legislative

95. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 177 n.15 (1978).

96. *Id.* at 178.

97. *Id.* at 169.

action enunciated by Judge Lowe, seems also to constitute the rationale for the limitations on judicial action delineated in *Flagg Brothers, Inc. v. Brooks*. It is in this sense that the *Gelpcke* dissent seems to me to function as a precedent for today.